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NUMBER

IN THE

SUPREME COURT OF THE UNITED STATES

TERM BEGINNING OCTOBER, 1990

THE STATE OF LOUISIANA,
RESPONDENT

VERSUS

TERRY FOUCHA,
PETITIONER

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner, Terry Foucha, who is now held in the Feliciana Forensic Facility, pursuant to an order dated October 11, 1984, respectfully asks leave to file the attached petition for a Writ of Certiorari to the United States Supreme Court without pre-payment of costs and to proceed in forma pauperis.

Petitioner has previously been adjudicated indigent by the State District Court which appointed the Loyola Law School Indigent Defender Program to represent him at the trial court level. Petitioner's affidavit in support of this petition is attached hereto.

BY: _____

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NUMBER

IN THE

SUPREME COURT OF THE UNITED STATES

TERM BEGINNING OCTOBER, 1990

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SUPREME COURT, U.S.

THE STATE OF LOUISIANA,
RESPONDENT

VERSUS

TERRY FOUCHA,
PETITIONER

APPLICATION TO PROCEED IN FORMA PAUPERIS,
SUPPORTING DOCUMENTATION & ORDER

I, TERRY FOUCHA, declare that I am the petitioner in the above-entitled proceeding; that, in support of my request to proceed without being required to prepay fees, cost or give security therefor, I state that because of my poverty, I am unable to pay the costs of said proceeding or give the security therefor; that I believe I am entitled to relief. The nature of my action, defense, or other proceeding or the issues I intend to present on appeal are briefly stated as follows:

I have been found to be no longer mentally ill by a three-member panel of psychiatrists at the Feliciana Forensic Facility and two psychiatrists appointed by the Criminal District Court for the Parish of Orleans. My continued confinement in a mental institution, despite the fact that I have been found to not be mentally ill, deprives me of my protection of due process and equal protection of the laws in violation of the United States Constitution.

In further support of this application, I answer the following questions.

1. Are you presently employed? X yes ____ no

   a. If the answer is "yes", state the amount of your salary or wages per month, and give the name and address of your employer. (list both gross and net salary)

The petitioner is employed as an in-patient laborer at the menta hospital. His wages are .75/hour for 30 hours/week. Total $90/mont

   b. If the answer is "no", state the date of last employment and the amount of the salary and wages per month which you received.

2. Have you received with the past twelve months any money from any of the following sources?

   a. Business, profession or other form of self-employment ____ yes X no

   b. Rent payments, interest or dividends? ____ yes X no

   c. Pensions, annuities or life insurance payments? ____ yes X no

   d. Gifts or inheritances? ____ yes X no

   e. Any other sources? X yes ____ no

If the answer to any of the above is "yes", describe each source of money and state the amount received from each during the past twelve years. The petitioner's parents receive approximately $300.00/month from Social Security based upon the petitioner's alleged incapacity.

3. Do you own any cash, or do you have money in checking or savings account? ____ yes X no (include any funds in prison accounts.)

   If the answer is "yes", state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing)? ____ yes X no

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support.

Mr. Donald Tibbs, father, (retired) and Mrs. Sylvia Tibbs, mother, (part-time housekeeper). Approximately $300/month from S.S.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 9/26/90 (Date) Terry Fausha (Signature of Applicant)

ORDER OF COURT

The application is hereby denied.

_____ _____
United States Judge Date

The application is hereby granted. Let the applicant proceed without prepayment of cost or fees or the necessity of giving security therefor.

_____ _____
United States Judge Date

CERTIFICATE
(Prisoner Accounts Only)

I certify that the applicant herein has the sum of $ 40.65 on account to his credit at the Feliciana Forensic Facility Institution where he is confined. I further certify that the applicant likewise has the following securities to his credit according to the records of said institution: _____

Geraldine R. Palmer
Authorized Officer of Institution

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NUMBER

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SUPREME COURT OF THE UNITED STATES

TERM BEGINNING OCTOBER, 1990

THE STATE OF LOUISIANA,
RESPONDENT

VERSUS

TERRY FOUCHA,
PETITIONER

RECEIVED
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SUPREME COURT, U.S.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES TO REVIEW A JUDGMENT OF A DECISION OF THE SUPREME COURT OF THE STATE OF LOUISIANA

BY: _____

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ORAL ARGUMENT IS REQUESTED

QUESTION PRESENTED

DOES THE LOUISIANA STATUTORY SCHEME WHICH ALLOWS THE STATE TO CONFINE AN INSANITY ACQUITTEE WHO IS NO LONGER MENTALLY ILL FOR AN INDEFINITE PERIOD OF TIME, SOLELY ON THE GROUNDS THAT THE INDIVIDUAL MAY BE A DANGER TO HIMSELF OR OTHERS, VIOLATE THE DUE PROCESS AND/OR EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

NUMBER

IN THE

SUPREME COURT OF THE UNITED STATES

TERM BEGINNING OCTOBER, 1990

THE STATE OF LOUISIANA,
RESPONDENT

VERSUS

TERRY FOUCHA,
PETITIONER

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

Terry Foucha, respectfully petitions the Supreme Court of the United States for a Writ of Certiorari to review the opinion and judgment of the Louisiana State Supreme Court rendered and entered in case number 89-KK-1352 of that Court on June 14, 1990, affirming the judgment of the Criminal District Court, State of Louisiana, Parish of Orleans, Section "I", case numbers 299-410 and 299-424.

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CONSTITUTIONAL AUTHORITIES

The Fourteenth Amendment of the United States Constitution

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Louisiana Code of Criminal Procedure Article 654

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OPINION BELOW

A copy of the opinion of the Louisiana Supreme Court rendered June 14, 1990 and entered on the same date, affirming the refusal of trial court to impliment the deinstitutionalization program as recommended by a three-member panel of psychiatrists from the Feliciana Forensic Facililty is attached hereto in the Appendix.

BASIS OF JURISDICTION

Jurisdiction is invoked under Title 28, United States Code, Section 1257 (2).

STATEMENT OF THE CASE

Defendant-Relator, TERRY FOUCHA, was charged by indictment with aggravated burglary pursuant to LA. R.S. 14:60. The defendant-relator was found not guilty by reason of insanity, and was ordered to undergo treatment at the Feliciana Forensic Facility on October 11, 1984. The Feliciana Forensic Facility, pursuant to LA. C.Cr.P. 655-657, appointed a three-member panel, which unanimously recommended that a probationary plan for deinstitutionalization be implemented on March 21, 1988. The Honorable Trial Court Judge, Shirley G. Wimberly, then received the opinion of the defendant-relator's two treating physicians, who stated the defendant-relator is mentally in good shape, with no evidence of psychosis or neurosis. The experts expressed their

opinion that the defendant-relator would not benefit from continued confinement at the Feliciana Forensic Facility. The Trial Court denied the defendant-relator's motion to implement the probationary plan.

The Fourth Circuit Court of Appeals for the State of Louisiana denied the defendant-relator's Application for Supervisory Writs by a 2-1 vote on May 18, 1989. The two-member majority, while taking note in their opinion, ignored the fact that the three-member forensic panel unanimously recommended a probationary plan of deinstitutionalization. The majority based its decision upon the fact that a single doctor could not say that the defendant-relator would not be a danger to himself or to others, and to certain incidents occurring after the panel concluded that the defendant-relator's condition of anti-social behavior was not treatable in a mental institution. The dissenting Judge, the Honorable Steven R. Plotkin, cited State v. Boulmay, 498 So.2d 213 (La. App. 1st Cir. 1986), writ denied 503 So.2d 473 (La. 1987) in finding that anti-social behavior is not a legal grounds for confinement of Feliciana Forensic Facility.

The Constitutionality of the Louisiana Statutory scheme for the continued confinement of an insanity acquittee was raised by

the defendant with Louisiana's Highest Court.

The Louisiana Supreme Court affirmed the State Court of Appeal on the grounds that Louisiana's Statutory scheme for the continued confinement of an insanity acquittee did not violate the appellant's rights to due process and equal protection of the laws as guaranteed by the Fourteenth Amendment of the United States Constitution, despite the appellant's argument to the contrary. The Louisiana Supreme Court found that a sole finding of dangerousness, without a concurrent finding of continuing mental illness was sufficient to deny release. Thus, the Louisiana scheme permits the confinement of a non-mental ill, insanity acquittee, for an indefinite period of time.

STATEMENT OF THE FACTS

Appellant, TERRY FOUCHA, was charged by indictment with aggravated burglary. The appellant was found not guilty by reason of insanity, subject to treatment for his mental condition at the Feliciana Forensic Facility pursuant to an order dated October 11, 1984. A three-member panel was appointed, upon the initiative of the Director of the Feliciana Forensic Facility and pursuant to Louisiana Code of Criminal Procedure Article 665, to review the appellant mental status. The panel unanimously recommended that Terry Foucha be conditionally discharged with certain

recommendations: 1) he be placed on probation; 2) he remain free from intoxicating and mind altering substances; 3) he attend a substance abuse clinic; 4) he submit to regular and random drug screening; and 5) he seek employment. (Exhibit 1) At all times the appellant would be under the strict supervision of probation office. As per Article 655 of the Louisiana Code of Criminal Procedure, the appellant was found by the panel to be no longer mentally ill, as defined by Louisiana Revised Statute 28:2(14) and the panel was of the opinion that the appellant is no longer dangerous to others or to himself as defined by Louisiana Revised Statute 28:2 (3) and (4). The Honorable Shirley G. Wimberly, Trial Judge, then on his own motion, appointed a two-member Sanity Commission.

At the Status Sanity Hearing conducted on November 29, 1988, the Court received the testimony of appointed examining psychiatrist, Dr. Kenneth Ritter. It was stipulated that the testimony of Dr. Ignacio Medina, Jr. would be essentially the same. Dr. Ritter stated that there was no evidence that Mr. Foucha currently suffered from any psychosis or neurosis. The doctor stated that Mr. Foucha would not benefit from continued confinement at the Feliciana Forensic Facility.

The Trial Court denied the motion to grant the implementation of the Panel's recommended program despite the opinion of a total of five psychiatrists that the defendant-relator does not currently

suffer from any form of psychosis or neurosis and that no benefit will be gained by continued confinement.

ISSUE

DOES THE LOUISIANA STATUTORY SCHEME WHICH ALLOWS THE STATE TO CONFINE AN INSANITY ACQUITTEE WHO IS NO LONGER MENTALLY ILL FOR AN INDEFINITE PERIOD OF TIME, SOLELY ON THE GROUNDS THAT THE INDIVIDUAL MAY BE A DANGER TO HIMSELF OR OTHERS, VIOLATE THE DUE PROCESS AND/OR EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

ARGUMENT

Louisiana Code of Criminal Procedure, Articles 654-657, provides that an individual who has been found not guilty by reason of insanity of a criminal offense shall be incarcerated at a mental institution or parish jail, until such time that the insanity acquittee meets the burden of proof that he can be released without danger to himself or others. (See FN-1). The Louisiana Supreme Court, by a 4-3 majority, held in the present case, upheld the Constitutionality of the scheme that provides for the continued confinement of an insanity acquittee after the individual has been found to no longer be mentally ill, solely on the grounds that the individual may be a danger to himself or others.

This holding is clearly contrary to the language utilized by this Honorable Court in Jones v. United States, 463 U.S. 354, 103 S.Ct. 3043, 77 L.Ed.2d 694 (1983). In that case, this Honorable Court found that a State could confine an insanity acquittee only

until the individual reacquired his sanity or is no longer mentally ill.

"We hold that when a criminal defendant establishes by a preponderance of the evidence, that he is not guilty of a crime by reason of insanity, the Constitution permits the Government, on the basis of the insanity judgment, to confine him to a mental institution until such time as he has reacquired his sanity or is no longer a danger to himself or society." Jones v. United States, 463 U.S. at 370. This holding clearly expressed the Court's opinion that there are two prongs to consider in analyzing the grounds for release of an insanity acquittee: 1) Whether the individual has regained his/her sanity; 2) Whether the individual is a danger to himself or society. Moreover, the language utilized by this Court clearly stated that the Constitution only permits a State to confine an insanity acquittee if both prongs are answered in the affirmative.

The 4-member majority of the Louisiana Supreme Court dismissed the language in Jones on the grounds that it mirrored the District of Columbia statute which required the release of an insanity acquittee if the individual was no longer mentally ill or not dangerous.

In support of it's holding, the Louisiana Supreme Court majority cites the United States Fourth Circuit Court of Appeal's decision in Harris v. Ballone, 681 F.2d 225 (4th Circuit 1982), which upheld the Virginia scheme. That Court found that it was

not a denial of due process to incarcerate an individual who has committed a criminal act as long as he is considered dangerous. This opinion, though, was prior to this Honorable Court's decision in Jones. Furthermore, the statute in Virginia provided that the insanity acquittee could not be incarcerated for a period greater than the maximum penal term applicable to the charged offense. Louisiana's scheme, to the contrary, provides no limitation as to the duration of potential confinement.

"Due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." Jackson v. Indiana, 406 U.S. 715, 738; 92 S.Ct. 1845, 1858; 32 L.Ed.2d 435 (1972).

"Commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection and the State must have a constitutionally adequate purpose for confinement." Addington v. Texas, 441 U.S. 418, 425 (1979). Therefore, the Louisiana scheme provides that your appellant, who has been found by five psychiatrists to no longer be mentally ill, may be confined for an indefinite period of time solely because the trial court found that he may be a danger to himself or others. The trial court based it's ruling on the fact that the appellant had been involved in an altercation which resulted in an individual being jabbed with a pen and the testifying psychiatrist would not "guarantee" that the appellant might not be a danger to himself or others. It should be noted that a rigid plan for

deinstitutionalization was recommended by the 3-member panel of psychiatrists for the State Mental Institution. (See FN-2). Thus, the appellant would not merely be set free from governmental supervision for the protection of himself and society.

The Louisiana Supreme Court majority found that the Louisiana scheme satisfies due process based upon the three factors stated in Mathews v. Eldridge, 424 U.S. 319, 335 (1976). (See FN-3). Without dealing with each of the three factors, the majority found that..."the dangerousness of La.C.Cr.P. Article 654-657 is constitutional." (See page 12 of the decision). Moreover, the majority cited the concurring opinion of the Honorable former Chief Justice Burger in O'Connor v. Donaldson, 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975), stating his belief that an individual may be confined by the State to protect society in exercise of the police power of the State.

While the majority in O'Connor at 575, stated that..."the State may arguably confine a person to save him from harm..." The Court went on to state that..."incarceration is rarely, if ever a necessary condition..." Moreover, the Court specifically limited the issue to be decided in O'Connor to the liberty interests of mentally ill individuals who are found not to be dangerous. That issue is quite different from the State continuing to confine a non-mentally ill individual in a mental institution, as we have in the present case. Furthermore, the Court in O'Connor found mental illness alone is not sufficient to justify the "State's locking a

person up against his will and keeping him indefinitely." 422 U.S. at 575. O'Connor, is thus consistent with Jones.

In addition to the violation of the appellant's right to due process guaranteed by the Fourteenth Amendment, the Equal Protection Clause of that Amendment is also violated by the Louisiana scheme.

The United States Fifth Circuit Court of Appeal has clearly expressed its opinion that an individual who is not presently mentally ill, must be deinstitutionalized. Francois v. Henderson, 850 F.2d 231, 235-236 (5th Cir.1983). In Hopkins v. Lynn, 888 F.2d 35 (5th Cir.1989), the Fifth Circuit supported its Francois opinion based upon this Court's treatment of the issue in Jones. Those decisions are consistent with the long standing treatment of this issue by the Fifth Circuit. In Jackson v. Foti, 670 F.2d 516 (5th Cir.1982), the Court faced an almost identical factual situation as is presented in this matter. While the Court doubted that the probative value of the evidence submitted showed that the applicant was sufficient to fall within the definite requirements of "dangerousness", the Fifth Circuit ordered the release of the applicant until such time as a judicial determination that the applicant was presently mental ill. The Court, at page 522, stated that:

> "Unless Jackson presently is mentally ill, as defined in the mental health law..., he may not be committed to an institution. The propensity for danger is not enough."

Moreover, the Court stated that:

> "Mental institutions exist for the benefit of those who can be helped by care and treatment or who require custodial attention. They can not substitute for prisons."

In Francois, the Court stated its basis for finding that Louisiana's scheme is presently violative of the Equal Protection Clause of the United States Constitution.

The Equal Protection Clause of the Fourteenth Amendment demands that the State afford insanity acquittees substantially the same protections that it gives persons committed under the ordinary civil commitment statute.

Braxstrom v. Herold, 383 U.S. 107, 86 S.Ct. 760, 15 L.Ed.2d 620 (1966); Jackson v. Indiana, 406 U.S. 715, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972); Humphrey v. Cady, 405 U.S. 504, 92 S.Ct. 1048, 31 L.Ed.2d 394 (1972); Jackson v. Foti, 670 F.2d 516 (5th Circuit 1982); Bolton v. Harris, 130 U.S. App.D.C.1, 395 F.2d 642 (1968), Powell v. Florida, 579 F.2d 324, 332 (5th Circuit 1978).

The Civil Commitment procedures are set forth in Title 28 of the Louisiana Revised Statutes. This scheme became affective by the passage of Acts 1987, No. 928 Section 2, by the State legislature. Prior to 1987, La. R.S. 28:59 called for the commitment of insanity acquittees "in the manner provided for judicial commitment". This language enabled the provisions regarding civil commitment to be read and applied in conjunction with the Criminal commitment articles. Thus, prior to 1987,

Louisiana law required a duel finding of mental illness and dangerousness for both Civil commitments and insanity acquittees. It is respectfully asserted that such a scheme provide adequate Constitutional protections. The legislature changes in 1987 provides in La.R.S. 28:59(A) that, "Any person acquitted of a crime or misdemeanor by reason of insanity or mental defect may be committed to the proper institution in accordance with Code of Criminal Procedure Articles 654 et seq." These articles provide for the commitment of an insanity acquittee following a hearing to determine the single issue of dangerousness, La.C.Cr.P. Article 654. Hearings on applications for release are likewise limited solely to the issue of dangerous. La.C.Cr.P. Articles 655-657. No concurrent findings of mental illness is necessary for initial commitment or upon application for release is required in cases involving insanity acquittees.

As for the discharge of Civil committees who have shown dangerous tendencies, La.R.S. 28:56(C), provides that the director of the treatment facility may authorize discharge upon written consent of the division of hospitals after an examination and after a sufficient guarantee of proper supervision of the patient by a reputable person. La.R.S. 28:96(E) and 28:96.1(E). It should be noted that your appellant's discharge is conditioned upon a four-point plan submitted by the three-person psychiatric review panel, intended to assure the appellant's and others' safety.

The Louisiana Supreme Court found that differences in the

Louisiana procedure reflect justifiable distinctions between persons civilly committed and persons found not guilty by reason of insanity. The Court relied upon the reason stated in Hickey v. Morris, 722 F.2d 543 (9th Circuit 1983).

The Ninth Circuit in Hickey upheld the differences in the commitment procedures provided by the Washington law and cited Jones v. United States, 463 U.S. at 370.

In Jones, the petitioner, an insanity acquittee, contended that his indefinite commitment was unconstitutional because of proof of his insanity was based only on a preponderance of the evidence, as compared with Addington v. Texas, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979), in which civil-commitment was required by proof of clear and convincing evidence. The Court recognized important differences between the class of potential civil-committees and insanity acquittees that justify "differing standard of proof."

It is respectfully asserted that the protections provided to an insanity acquittee, by requiring a concurrent finding of mental illness, in addition to dangerousness, cannot be justified by reasoning of Jones. The Court in Addington, found that the Due Process Clause of the Fourteenth Amendment was not violated by requiring the diminished burden of proof in insanity acquitee cases. The Court noted in Jones at F.N. 17, that in fact, the defendant is benefited by the lessor burden of proof in that the criminal defendant is the party who will raise the issue of

insanity.

The elimination of the element of mental illness, therefore, is distinguishable from the "differing standards of proof" as annunciated in Jones. Moreover, the language utilized by this Court to specify "differing standards of proof" should not be interpreted by the lower Courts to include any difference in treatment.

Furthermore, in Hickey, the Court found that the State's different procedure for review and release were substantially related to important government interests. The State provided periodic judicial review for Civil committees and not for insanity acquittees. The Court found that this was justified on the grounds that Civil commitments are of potentially unlimited duration, while insanity acquittees cannot be confined longer than a maximum penal term for the crime charged. Therefore, the Court found that the Equal Protection Clause was not violated by the State's providing for 180-day judicial reviews for Civil committees as opposed to the insanity acquittee's semi-annual non-judicial reviews. If the hospital staff recommends release, there is a judicial hearing. If no recommendation is made, judicial review is discretionary. This difference was found to reflect justifiable distinctions regarding the treatment of each class.

Louisiana's scheme, to the contrary, and as stated above, provides absolutely no limit to the duration of the potential confinement of an insanity acquittee. Your appellant was found not

guilty by reason of insanity on October 12, 1984 and was first recommended for release on March 21, 1988.

The Louisiana scheme clearly provides insanity acquittees with substantially less protection than are provided for civil protection than are provided for civil committees. This distinction is not justified by constitutionally adequate purposes.

CONCLUSION

The appellant has been recommended for release by a three-member panel of psychiatrists set up by the State Mental Institution of which he is an "inmate". This recommendation is pursuant to their unanimous finding that he is no longer mentally ill, coupled with a deinstitutionalization plan catered to ensure his safe release back into society. In addition, the record indicates that the two court-appointed psychiatrists concur in the diagnosis that the appellant does not presently suffer from any mental illness.

The appellant, a completely sane individual, according to five doctors of psychiatry, who was found not guilty because of his mental state at the time of the offense charged, is being forcibly held by the State of Louisiana in a mental institution. To quote Louisiana Supreme Court Justice Dennis, one of three dissenting Justices, "Something is drastically wrong with a legal system that permits a person who is no longer mentally ill to be confined indefinitely, perhaps for life, in an institution for the

criminally insane simply because he was acquitted for a crime (on the basis of insanity at the time of offense), a crime for which, had he been convicted instead, he may have received a sentence of only a few months or years."

Mr. Foucha has been incarcerated for nearly six years.

The United States Fifth Circuit in Jackson v. Foti, at 522 and repeated in Francois at 236 that:

> "Mental institutions exist for the benefit of those who can be helped by care and treatment or who require custodial attention. They are not substitutes for prisons. Nor can they be permitted to become such."

It is respectfully urged, that in Louisiana, mental institutions are far worse than prison because Mr. Foucha faces the prospect of spending the rest of his life, a life of sanity, in a mental institution. It is further urged that Mr. Foucha is not the only citizen who is being harmed by the State's approach. The continued confinement in the State Mental Institutions of individuals who are not mentally ill, harms those citizens who are in present need of psychiatric help. The mental hospital itself initiated these actions seeking the release of Mr. Foucha because their job was successfully completed in his case. There are other citizens who could benefit from their care. Thus, Mr. Foucha who is not mentally ill, is being harmed by being incarcerated in a mental institution, while there is a mentally ill person who is languishing in a Louisiana prison, instead of being treated for his mental illness.

It is, therefore, respectfully requested that this Honorable Court reverse the decision of the Louisiana Supreme Court on the grounds that the Louisiana scheme for review and release on an insanity acquittee, violates the Fourteenth Amendment of the United States Constitution by allowing the continued confinement based solely upon a judicial finding of dangerousness, without a concurrent finding of mental illness.

Respectfully Submitted:

BY: _____

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---

1 La. Code Crim. P. art. 654 provides:

> When a verdict of not guilty by reason of insanity is returned in a capital case, the court shall commit the defendant to a proper state mental institution or to a private mental institution approved by the court for custody, care, and treatment.
>
> When a defendant is found not guilty by reason of insanity in any other felony case, the court shall remand him to the parish jail or to a private mental institution approved by the court and shall promptly hold a contradictory hearing at which the defendant shall have the burden of proof, to determine whether the defendant can be discharged or can be released on probation, without danger to others or to himself. If the court determines that the defendant cannot be released without danger to others or to himself, it shall order him committed to a proper state mental institution or to a private mental institution approved by the court for custody, care, and treatment. If the court determines that the defendant can be discharged or released on probation without danger to others or to himself, the court shall either order his discharge, or order his release on probation subject to specified conditions for a fixed or an indeterminate period. The court shall assign written findings of fact and conclusions of law; however, the assignment of reasons shall not delay the implementation of judgment.

La. Code Crim. P. art. 655 provides:

> A. When the superintendent of a mental institution is of the opinion that a person committed pursuant to Article 654 can be discharged or can be released on probation, without danger to others or to himself, he shall recommend the discharge or release of the person in a report to a review panel comprised of the person's treating physician, the clinical director of the facility to which the person is committed, and a physician or psychologist who served on the sanity commission which recommended commitment of the person. If any member of the panel is unable to serve, a physician or a psychologist engaged in the practice of clinical or counseling psychology with at least three years experience in the field of mental health shall be appointed by the remaining members. The panel shall review all reports received promptly, After review, the panel shall make a recommendation to the court by which the person was committed as to the person's mental condition and

whether he can be discharged, conditionally or unconditionally, or placed on probation, without being a danger to others or himself. If the review panel recommends to the court that the person be discharged, conditionally or unconditionally, or placed on probation, the court shall conduct a contradictory hearing following notice to the district attorney.

B. A person committed pursuant to Article 654 may make application to the review panel for discharge or for release on probation. Such application by a committed person may not be filed until the committed person has been confined for a period of at least six months after the original commitment. If the review panel recommends to the court that the person be discharged, conditionally or unconditionally, or placed on probation, the court shall conduct a hearing following notice to the district attorney. If the recommendation of the review panel or the court is adverse, the applicant shall not be permitted to file another application until one year has elapsed from the date of determination.

C. The superintendent of the mental institution shall, under both Paragraphs A and B of this article, transmit a copy of this report and recommendation to the person committed or his attorney and to the district attorney of the parish from which the person was committed.

La. Code Crim. P. art. 656 provides:

A. Upon receipt of the superintendent's report, filed in conformity with Article 655, the review panel may examine the committed person and report, to the court promptly, whether he can be safely discharged, conditionally or unconditionally, or be safely released on probation, without danger to others or himself.

B. The committed person or the district attorney may also retain a physician to examine the committed person for the same purpose. The physicians's report shall be filed with the court.

La. Code Crim. P. art. 657 provides:

After considering the report or reports filed pursuant to Articles 655 and 656, the court may either continue the commitment or hold a contradictory hearing to determine whether the committed person can be discharged, or can be released on probation, without danger to others or to himself.

At the hearing the burden shall be upon the committed person to prove that he can be discharged, or can be released on probation, without danger to others or to himself. After the hearing, and upon filing written findings of fact and conclusions of law, the court may order the committed person discharged, released on probation subject to specified conditions for a fixed or an indeterminate period, or recommitted to the state mental institution. Notice to the counsel for the committed person and the district attorney of the contradictory hearing shall be given at least thirty days prior to the hearing.

2 The panel recommended that defendant be discharged with the following recommendations:

1. He be placed on probation, the length to be determined by the court.

2. He remain free from intoxicating and mind-altering substances.

3. He attend a Substance Abuse Clinic on a regular basis.

4. He submit to regular and random urine drug screens at the local mental health center.

5. He be actively employed or seeking employment.

3 "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. Mathews v. Eldridge, 424 U.S. 219, 335 (1976).

NUMBER

IN THE

SUPREME COURT OF THE UNITED STATES

TERM BEGINNING OCTOBER, 1990

THE STATE OF LOUISIANA,
RESPONDENT

VERSUS

TERRY FOUCHA,
PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of September, 1990, in accordance with Rule 33 of the rules of the Supreme Court of the United States, copies of the following:

1. Motion for Leave to Proceed in Forma Pauperis
2. Affidavit in Support of Petition For Leave to Proceed in Forma Pauperis
3. Petition for Writ of Certiorari, and
4. Certificate of Service

were served upon the District Attorney for the Parish of Orleans, State of Louisiana by delivering the above copies to the Appellate

Division of the Orleans Parish District Attorney Office.

BY: Martin E. Regan, Jr.

MARTIN E. REGAN, JR.
COUNSEL OF RECORD
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JAMES P. MANASSEH
LOUISIANA BAR NO. 19022
ATTORNEY FOR PETITIONER
336 LOUISIANA AVENUE
SECOND FLOOR
BATON ROUGE, LOUISIANA 70802
(504) 383-9703

Exhibit #1

REVIEW PANEL REPORT

The Superintendent of the Feliciana Forensic Facility having recommended the discharge or release of Terry Foucha, a Review Panel was convened on March 17, 1988 pursuant to LA Code of Criminal Procedure Article 655 (as amended by Act 928, July 20, 1987) to consider (1) the person's current mental condition, that is, whether he currently suffers from a mental disorder, the severity of which adversely affects his ability to function and which requires care and treatment in a hospital setting and (2) whether he can be discharged, conditionally or unconditionally, or placed on probation without being a danger to others or himself.

Now, therefore, it is the recommendation of the Review Panel the following: Terry Foucha's main diagnosis is Antisocial Personality Disorder and never any evidence of mental illness or disease since admission. In addition to his personality problem he has had a long problem with poly-substances abuse. Terry Foucha is not on any medication.

As there is no evidence of mental illness, the Review Panel recommends that Terry Foucha be conditionally discharged with the following recommendations:

1. He be placed on probation, the length to be determined by the court.
2. He remain free from intoxicating and mind-altering substances.
3. He attend a Substance Abuse clinic on a regular basis.
4. He submit to regular and random urine drug screens at the local mental health center.
5. He be actively employed or seeking employment.

Signed this 28th day of March, 1988

Colin C. J. Angliker, M.D.
Review Panel Chairperson

Thomas C. Fain, Ph.D.
Review Panel Member

Charles P. Vosburg, Ph.D.
Review Panel Member

Feliciana Forensic Facility
Jackson, Louisiana

OCR: 0312 OCR: 2777

Exhibit #2

New Orleans La April 28 1988

Honorable Shirley G. Wimberly Jr.
Judge, Section E
Criminal District Court
Parish of Orleans

Re: Terry Foucha
294-410

Dear Judge:

Pursuant to your appointment, the undersigned evaluated Terry Foucha concerning his present mental state and whether or not he would pose a danger to himself or to others if released.

As a result of our examinations, we believe that Terry Foucha is presently in remission from mental illness. We cannot certify that he would not constitute a menace to himself or to others if released.

Yours truly,

Kenneth N. Miller M.D.

Ignacio Medina Jr. M.D.

OCR: 0134 OCR: 1077

Filed 5/12/88

By

Exh. 1 of 3

STATE OF LOUISIANA — CRIMINAL DISTRICT COURT

VS. — PARISH OF ORLEANS

TERRY FOUCHA — SECTION "I"

R.S. 14:60 — CASE NO. 299-410

R.S. 14:94 — CASE NO. 299-424

Transcript of the the lunacy hearing held on date of November 29, 1988 in open court proceedings before the HONORABLE SHIRLEY G. WIMBERLY, JR., JUDGE, Criminal District Court, Section "I".

* *

APPEARANCES:

JANET AHERN, ESQ.,
Assistant District Attorney
Parish of Orleans

PEIRCE HAMMOND, ESQ.,
Assistant District Attorney
Parish of Orleans

CALVIN JOHNSON, ESQ.,
Loyola Law Clinic
Counsel for defendant Terry Foucha

* * * * * *

Reported by:
Daryl Duplessie, CSR
Official Court Reporter
Section "I"

AFTER BEING FIRST DULY SWORN, KENNETH RITTER TESTIFIED ON HIS OATH AS FOLLOWS:

EXAMINATION BY MISS AHERN:

Q. Would you state your name and occupation for the record, please?

A. Dr. Kennath A. Ritter, I am a physician and a specialist in psychiatrist.

BY MISS AHERN:

Your Honor, at this time the state would offer to the defense a stipulation that Dr. Ritter is in fact a doctor with expertise in psychiatry.

BY MR. JOHNSON:

That's acceptable, Judge.

BY THE COURT:

Alright, stipulation is accepted.

EXAMINATION BY MISS AHERN:

Q. Dr. Ritter, pursuant to a court appointment, have you had the occasion to examine the defendant before the bar, Terry Foucha?

A. Yes, ma'am.

Q. And at this time could you please relate to the court what you have learned since or during that examination?

A. Well, the man presently is in mentally in good shape, find no evidence of psychosis or neurosis in this man. The court had addressed a letter to us asking us to determine competence which I think

was probably not valid because the man has already been declared not guilty by reason of insanity, and has been confined to Feliciana for about four and a half years. I suspect that the issue was one like the last one which was in May. We testified that this man--the issue then was whether or not this man could be safely released-

Q. That's correct, doctor.

A. --on probation, and whether or not he was a danger-- would be a danger to himself or to other people. That situation, and I think that's what we were called upon to do now.

Q. That's correct, doctor.

A. So, I think our attitude is about the same as it was then. This man proved out to be an anti-social personality, probably with a drug induced psychosis originally, and currently he is in good shape. Unfortunately he's gotten into a lot of difficulties at Feliciana. He reported to me that several months ago, within the last couple of months that he had been sent back to the maximum security section because of an altercation with another patient. He had been--the record that we have from Feliciana shows recurrent problems in manage--in management.

Q. Doctor, when you say recurrent problems in management, could you be more specific?

A. Well, his--his attitude had been one of extremely

paranoid, arrogant, threatening, there had been some altercations with other patients.

Q. Has there been any altercations with any of the employees of Feliciana?

A. Well, there was one situation where he got into an altercation with another patient and one of our security guards was stabbed with a--a ball point pen.

BY THE COURT:

Who stabbed him?

BY THE WITNESS:

I think Mr. Foucha had the ball point pen.

EXAMINATION BY MISS AHERN:

Q. Doctor, you described the defendant's condition as anti-social behavior. What specifically--is that a diagnosis, is that--

A. Yes, an anti-social personality is a diagnosis.

Q. Okay. Is that a--

A. The basis for that diagnosis is early development of anti-social behavior during early teenagers which--which continued, and anti-social meaning illegal behavior.

Q. Is that termed as a mental or a social illness?

A. That is termed as a personality disorder.

Q. Okay, and doctor you also stated that he has a drug induced psychosis?

A. We thought--we thought that maybe because of the fact we could never determine whther or not the man

was malingering, mental illness, or whether it was a truly induced drug psychosis, but at the original time that we saw him we thought that he was psychotic.

Q. Doctor, is anti-social behavior treatable by medication?

A. No, ma'am, it's not, anti-social behavior is personality situation. Nobody has ever successfully altered personality structure in people of this type.

Q. And the drug induced psychosis, could you describe for me more fully what that exactly means?

A. What I think it--what it means is that it's a toxic state produced by drugs.

Q. Okay.

A. Temporary, it may--it may last for several weeks or several months, depending upon what--what drug that was used.

Q. And--

A. For example if angel dust, phencyclidene, was used, that can produce a psychosis, one I read about lasted four and a half years. Again depending upon the drug. There are short acting drugs and longer acting drugs, there are drugs which are stored in the body and periodically released and can produce the flashbacks, can produce the same behavior. So, you know, it depends upon which drugs that we use.

Q. If the defendant was in fact released and didn't get

into such drugs it would--feel possible that this psychosis would reassert itself.

A. Certainly could.

Q. Doctor, in your opinion, is the defendant currently a danger to himself or--and others?

A. The indications of that and we do have a report from the panel at Feliciana and everything I have been able to learn in this defendant's situation, I don'tthink I would feel comfortable in certifying that he would not be a danger to himself or to other people.

Q. Doctor, you referred to a report from the panel. Is that report dated from March 21st of this year?

A. That's correct.

Q. Okay, and these incidents that have occurred that caused the defendant to be returned to maximum security have--

A. Since that time.

BY MISS AHERN:

Tender witness.

EXAMINATION BY MR. JOHNSON:

Q. Dr. Ritter, he is not currently suffering from a drug induced psychosis?

A. No, he's not.

Q. And currently--

A. He's--he's currently suffering from no psychosis.

Q. Currently his problem would be, in essence behavior?

A. Absolutely.

Q. Will his continued confinement at Feliciana--is it--is it possible that his continued confinement at Feliciana will in some way solve the behavior problem?

A. I have grave doubts that it can.

Q. Is there--there something that--that treatment could do, either--either in a confined setting or in a outpatient setting that could in effect treat the behavior problem?

A. To my knowledge if this diagnosis is true and valid, there has been no approach which has ever been successful, and it's been tried.

Q. And you--you base your dangerousness finding upon the behavioral problem?

A. Of course.

BY MR. JOHNSON:

I have no further questions, Judge.

BY MISS AHERN:

Your Honor, I have one more.

EXAMINATION BY MISS AHERN:

Q. Doctor, you are stating that--

A. Well, wait a minute, on the behavioral problem in--within the hospital, but also the behavioral problem regarding the nature of the charge.

Q. You stated that you are--you are not familiar with any treatment or program that would assist this defendant in treating this behavioral problem?

A. That's correct. I have not seen any past or present literature which would indicate to me that there is any hope for alter--altering the personality structure in an anti-social personality.

Q. Therefore, releasing this defendant and placing him on probation would not in fact treat or control this behavior?

A. No.

Q. And again if he was released, would there be anyway in which we could be positive that this defendant would not take any of these drugs that would induce this psychosis?

A. No.

BY MISS AHERN:

No further questions.

BY MR. JOHNSON:

Judge, if I may, just--just one followup to that.

EXAMINATION BY MR. JOHNSON:

Q. In continuing him in a confined setting will not treat the problem either though, Dr. Ritter. Is that--is that not also correct?

A. That's essentially correct.

BY MR. JOHNSON:

I have nothing else.

BY THE WITNESS:

We don't--we don't have any facilities at Feliciana or anyplace in the world that I know of--

EXAMINATION BY MR. JOHNSON:

Q. To treat the problem?

A. --where an anti-social personality can be effectively treated and altered to the point of being a social personality.

Q. What--if there was a--a halfway situation, halfway house in New Orleans whereby he could be confined in--in that setting, would that be a better solution to the problem?

A. I don't think so.

Q. Than simply confining him?

A. I don't think a halfway house would assist materially. The halfway houses that I am familiar with here, some of--some of them are just, Mr. Johnson, some of them are just plain flop houses. There is no supervision, the state pays a certain amount to these people to provide a halfway house, but these are not truly--the idea would be good, halfway house but we don't have any as far as I know in this--in this community, wish to goodness we had and I don't think that would be the answer for this man.

BY MR. JOHNSON:

I have nothing else, Judge.

BY THE COURT:

Thank you, doctor.

BY MISS AHERN:

Submitted by the state, Your Honor.

BY MR. JOHNSON:

Judge, we submit.

BY THE COURT:

Alright.

BY MISS AHERN:

I am sorry, Your Honor. At this time the state would offer a stipulation to the defense that if Dr. Hedina were to testify, his testimony would be essentially the same.

BY MR. JOHNSON:

That's acceptable, Judge.

BY THE COURT:

Alright. Stipulation is accepted. Court finds the defendant is a danger to others, order him recommitted.

BY MR. JOHNSON:

Judge, for the record we would note our objection to the court's ruling and Judge we would give the court a notice orally now of our intent to seek writs in this matter.

BY THE COURT:

Alright.

* * * * * * * * * * *

MAY 2 1989

PUBLISHER'S NOTE:

ORIGINAL PAGINATION IS NOT CONTINUOUS.

STATE OF LOUISIANA	¶	NO. 89-K-0708
VERSUS	¶	COURT OF APPEAL
TERRY FOUCHA	¶	FOURTH CIRCUIT
	¶	STATE OF LOUISIANA

¶ ¶ ¶ ¶ ¶ ¶ ¶ ¶ ¶ ¶

IN RE: TERRY FOUCHA
APPLYING FOR: SUPERVISORY WRITS
DIRECTED TO: HONORABLE SHIRLEY G. WIMBERLY, JUDGE
CRIMINAL DISTRICT COURT, PARISH OF ORLEANS
SECTION "I", NO. 299-410

WRIT DENIED

Though the three member forensic panel unanimously recommended a probationary plan to deinstitutionalize relator, the court-appointed psychiatrist testified that he could not say relator would not be a danger to himself or to others. He further testified that he based that conclusion in part on incidents which occurred after the panel's recommendation.

We find no error.

New Orleans, Louisiana, this 18 day of May, 1989.

JUDGE DENIS A. BARRY

JUDGE WILLIAM H. BYRNES, III

A TRUE COPY
NEW ORLEANS MAY 18 1989
CLERK
COURT OF APPEAL FOURTH CIRCUIT

PLOTKIN, J., dissents.

All examining psychiatrists opined that relator currently does not have evidence of psychosis, neurosis or mental illness. The review panel recommended his conditional discharge. All doctors agreed that his primary diagnosis is antisocial disorder, a condition that is untreatable in a mental institution -- not a legal ground for confinement at Feliciana Forensic Facility. Relator has met his burden of proof pursuant to La. C.Cr.P. Art. 657 and is entitled to a conditional discharge. State v. Boulmay, 498 So.2d 213 (La. App. 1st Cir. 1986), writ denied 503 So.2d 473 (La. 1987).

SRP

JUDGE STEVEN R. PLOTKIN

SUPREME COURT OF LOUISIANA

NO. 89-KK-1352

STATE OF LOUISIANA

V.

TERRY FOUCHA

JUN 14 1990

ON WRIT OF CERTIORARI OR REVIEW TO THE CRIMINAL DISTRICT COURT, PARISH OF ORLEANS, SECTION "I", STATE OF LOUISIANA HONORABLE SHIRLEY G. WIMBERLY, JR., PRESIDING

MARCUS, Justice*

The issues in this case are whether defendant is dangerous to others or to himself under La. Code Crim. P. art. 657 and, if so, whether it is constitutionally permissible for dangerousness to be the test for the continued detention of a person found not guilty by reason of insanity.

Terry Foucha was charged by bill of information with committing aggravated burglary of an inhabited dwelling while armed with a .357 revolver in violation of La. R.S. 14:60[1] and illegal discharge of firearm in violation of La. R.S. 14:94.[2] Defendant entered a plea of not guilty and filed an oral motion

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1 La. R.S. 14:60 provides:

> Aggravated burglary is the unauthorized entering of any inhabited dwelling, or of any structure, water craft, or movable where a person is present, with the intent to commit a felony or any theft therein, if the offender,
> (1) Is armed with a dangerous weapon; or
> (2) After entering arms himself with a dangerous weapon; or
> (3) Commits a battery upon any person while in such place, or in entering or leaving such place.
> Whoever commits the crime of aggravated burglary shall be imprisoned at hard labor for not less than one nor more than thirty years.

2 La. R.S. 14:94 provides in relevant part:

> A. Illegal use of weapons or dangerous instrumentalities is the intentional or criminally negligent discharging of any firearm, or the throwing, placing, or other use of any article, liquid, or substance, where it is foreseeable that it may result in death or great bodily harm to a human being.
>
> B. Whoever commits the crime of illegal use of weapons or dangerous instrumentalities shall be fined not more than one thousand dollars, or imprisoned with or without hard labor for not more than two years, or both.

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*Retired Chief Justice John A. Dixon, Jr. participated in this case, having been a member and Chief Justice of this court when the case was orally argued and taken under advisement.

Dennis J. dissents with reasons
Calogero, C.J. dissents for the reasons assigned by Dennis, J.

for a sanity commission. The trial court granted the motion and appointed two experts in forensic psychiatry, Dr. Kenneth Ritter and Dr. Ignacio Medina, Jr., to examine defendant. The trial court initially found that defendant lacked mental capacity to proceed, but four months later found that he had mental capacity to proceed. After a hearing, on October 12, 1984, the court found defendant not guilty by reason of insanity.[3] The court found that he "is unable to appreciate the usual, natural and probable consequences of his acts; that he is unable to distinguish right from wrong; that he is a menace to himself and others; and that he was insane at the time of the commission of the . . . crimes and that he is presently insane." The court ordered that he be committed to a mental institution pursuant to La. Code Crim. P. art. 654.[4] On April 30, 1985, he was admitted to the Feliciana Forensic Facility at Jackson, Louisiana. On

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3 Apparently, the court was relying on La. Code Crim. P. art. 558.1, which provides:

> The court may adjudicate a defendant not guilty by reason of insanity without trial, when the district attorney consents and the court makes a finding based upon expert testimony that there is a factual basis for the plea.

4 La. Code Crim. P. art. 654 provides:

> When a verdict of not guilty by reason of insanity is returned in a capital case, the court shall commit the defendant to a proper state mental institution or to a private mental institution approved by the court for custody, care, and treatment.
>
> When a defendant is found not guilty by reason of insanity in any other felony case, the court shall remand him to the parish jail or to a private mental institution approved by the court and shall promptly hold a contradictory hearing at which the defendant shall have the burden of proof, to determine whether the defendant can be discharged or can be released on probation, without danger to others or to himself. If the court determines that the defendant cannot be released without danger to others or to himself, it shall order him committed to a proper state mental institution or to a private mental institution approved by the court for custody, care, and treatment. If the court determines that the defendant can be discharged or released on probation without danger to others or to himself, the court shall either order his discharge, or order his release on probation subject to specified conditions for a fixed or an indeterminate period. The court shall assign written findings of fact and conclusions of law; however, the assignment of reasons shall not delay the implementation of judgment.

June 11, 1987, the facility informed the trial court that defendant had requested a contradictory hearing to obtain periodic passes with family supervision. The court again appointed Dr. Ritter and Dr. Medina to determine defendant's present mental condition. After a hearing, the court ordered that defendant be returned to the facility for further care, custody, and treatment. Because the superintendent of the facility recommended that defendant be discharged or released, a review panel of three doctors was convened pursuant to La. Code Crim. P. art. 655.[5] On March 21, 1988, the panel issued a

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5 La. Code Crim. P. art. 655 provides:

> A. When the superintendent of a mental institution is of the opinion that a person committed pursuant to Article 654 can be discharged or can be released on probation, without danger to others or to himself, he shall recommend the discharge or release of the person in a report to a review panel comprised of the person's treating physician, the clinical director of the facility to which the person is committed, and a physician or psychologist who served on the sanity commission which recommended commitment of the person. If any member of the panel is unable to serve, a physician or a psychologist engaged in the practice of clinical or counseling psychology with at least three years' experience in the field of mental health shall be appointed by the remaining members. The panel shall review all reports received promptly. After review, the panel shall make a recommendation to the court by which the person was committed as to the person's mental condition and whether he can be discharged, conditionally or unconditionally, or placed on probation, without being a danger to others or himself. If the review panel recommends to the court that the person be discharged, conditionally or unconditionally, or placed on probation, the court shall conduct a contradictory hearing following notice to the district attorney.
>
> B. A person committed pursuant to Article 654 may make application to the review panel for discharge or for release on probation. Such application by a committed person may not be filed until the committed person has been confined for a period of at least six months after the original commitment. If the review panel recommends to the court that the person be discharged, conditionally or unconditionally, or placed on probation, the court shall conduct a hearing following notice to the district attorney. If the recommendation of the review panel or the court is adverse, the applicant shall not be permitted to file another application until one year has elapsed from the date of determination.
>
> C. The superintendent of the mental institution shall, under both Paragraphs A and B of this article, transmit a copy of this report and recommendation to the person committed or his attorney and to the district attorney of the parish from which the person was committed.

report pursuant to La. Code Crim. P. art. 656[6] recommending that defendant be conditionally discharged.[7] On November 29, 1988, after a contradictory hearing, the court found that defendant was a danger to others and ordered him recommitted. The court of appeal denied defendant's application for writs, with one judge dissenting. We granted defendant's application to review the correctness of the decision not to release him.[8]

When a person has been committed after pleading not guilty by reason of insanity, the burden is upon the committed person to prove that he can be released without danger to others or to himself. La. Code Crim. P. art. 657.[9] "Dangerous to others" means the condition of a person whose behavior or significant threats support a reasonable expectation that there is a

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6 La. Code Crim. P. art. 656 provides:

A. Upon receipt of the superintendent's report, filed in conformity with Article 655, the review panel may examine the committed person and report, to the court promptly, whether he can be safely discharged, conditionally or unconditionally, or be safely released on probation, without danger to others or to himself.

B. The committed person or the district attorney may also retain a physician to examine the committed person for the same purpose. The physician's report shall be filed with the court.

7 The panel recommended that defendant be discharged with the following recommendations:

1. He be placed on probation, the length to be determined by the court.

2. He remain free from intoxicating and mind-altering substances.

3. He attend a Substance Abuse Clinic on a regular basis.

4. He submit to regular and random urine drug screens at the local mental health center.

5. He be actively employed or seeking employment.

8 548 So. 2d 1215 (La. 1989).

9 La. Code Crim. P. art. 657 provides:

After considering the report or reports filed pursuant to Articles 655 and 656, the court may either continue the commitment or hold a contradictory hearing to determine whether the committed person can be discharged, or can be released on probation, without danger to others or to

[footnote 9 continued on next page]

substantial risk that he will inflict physical harm upon another person in the near future. La. R.S. 28:2(3). "Dangerous to self" means the condition of a person whose behavior, significant threats or inaction supports a reasonable expectation that there is a substantial risk that he will inflict physical or severe emotional harm upon his own person. La. R.S. 28:2(4).

In a Feliciana Forensic Facility progress note dated August 23, 1985, Dr. Aris Cox, the Forensic Psychiatric Program Administrator at the facility, wrote that defendant "remains combative, agitated, and psychotic." In a facility progress note dated September 24, 1986, Dr. Porfirio Callo, a psychiatrist, wrote that defendant "continues to be a menace to society." The review panel stated in its March 21, 1988 report that defendant's "main diagnosis is Antisocial Personality Disorder," but there was "never any evidence of mental illness or disease since admission." The panel did not discuss whether defendant was dangerous. At the hearing on November 29, 1988, Dr. Ritter also stated that defendant has an antisocial personality. According to Dr. Ritter, at the time of the hearing there was no evidence of psychosis or neurosis and defendant was in "good shape" mentally. However, defendant previously had a drug-induced psychosis. If defendant was released, that psychosis could reassert itself. Dr. Ritter further testified that defendant's record at the facility showed recurrent problems. Defendant has been involved in altercations with other patients. Within the two months before the hearing, he had been sent to the maximum security section because of an

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[continuation of footnote 9]

himself. At the hearing the burden shall be upon the committed person to prove that he can be discharged, or can be released on probation, without danger to others or to himself. After the hearing, and upon filing written findings of fact and conclusions of law, the court may order the committed person discharged, released on probation subject to specified conditions for a fixed or an indeterminate period, or recommitted to the state mental institution. Notice to the counsel for the committed person and the district attorney of the contradictory hearing shall be given at least thirty days prior to the hearing.

altercation with another patient. Defendant's "attitude had been . . . extremely paranoid,"[10] as well as arrogant and threatening. Dr. Ritter refused to say that defendant would not be a danger to others or to himself. The parties stipulated that if Dr. Medina were to testify, his testimony would be essentially the same. Under the circumstances, we are unable to say that the trial court abused its discretion in finding that defendant did not prove that he could be released without danger to others or to himself under La. Code Crim. P. art. 657.

Next, we consider defendant's contention that the dangerousness test of La. Code Crim. P. arts. 654-657 violates due process and equal protection.[11] Similar laws have been

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10 A facility mental status examination update dated April 3, 1989, sent to the trial court by the facility after the court's ruling, states that defendant more often than not is "rather suspicious and paranoid and denies any responsibility for his actions. The paranoia he exhibited today upon interview does not seem exclusively related to the diagnosis of Antisocial Personality Disorder and probably reflects an additional Axis II diagnosis of Paranoid Personality. . . . He has minimal insight into his responsibilities for his own behavior . . . ."

11 Defendant relies on Francois v. Henderson, 850 F.2d 231 (5th Cir. 1988), which indicates in dicta that La. Code Crim. P. arts. 654-657 are unconstitutional. Again in dicta, the Fifth Circuit agreed with Francois in Hopkins v. Lynn, 888 F.2d 35 (5th Cir. 1989). According to Francois, "the Supreme Court has held that the equal protection clause requires the application of identical standards to civil and criminal commitment decisions." Francois, 850 F.2d at 236 (emphasis added). In fact, the United States Supreme Court has approved the application of different standards to civil and criminal commitment decisions. In Addington v. Texas, 441 U.S. 418 (1979), the Court "held that the Due Process Clause requires the Government in a civil-commitment proceeding to demonstrate by clear and convincing evidence that the individual is mentally ill and dangerous." Jones v. United States, 463 U.S. 354, 362 (1983). In Jones, the Court held that the "[t]he preponderance of the evidence standard comports with due process for commitment of insanity acquittees." Id. at 368. Moreover, "if the Due Process Clause does not require that an insanity acquittee be given the particular procedural safeguards provided in a civil-commitment hearing under Addington, then there necessarily is a rational basis for equal protection purposes for distinguishing between civil commitment and commitment of insanity acquittees." Id. at 362 n.10. Accordingly, we find the dicta in Francois and Hopkins to be unpersuasive.

Defendant also erroneously relies on Jones. In Jones, the Supreme Court did not consider whether it is constitutionally permissible for dangerousness to be the test for the continued

[footnote 11 continued on next page]

held constitutional. Hickey v. Morris, 722 F.2d 543 (9th Cir. 1983) (upholding Washington law permitting insanity acquittee to be released only if there would be no substantial danger to other persons or no substantial likelihood of committing felonious acts jeopardizing public safety or security); Harris v. Ballone, 681 F.2d 225 (4th Cir. 1982) (upholding Virginia law permitting insanity acquittee to be released only if the acquittee is not insane and his release would not be dangerous to the public peace and safety or to himself); State v. Mahone, 379 N.W.2d 878 (Wis. App. 1985) (upholding Wisconsin law permitting insanity acquittee to be released only if there would be no danger to himself or others).

In Hickey, a class of insanity acquittees challenged Washington's criminal commitment and release procedures. They contended that the disparity between civil and criminal procedures denied them equal protection. The Ninth Circuit acknowledged differences in the civil and criminal procedures and held that the differences did not violate equal protection. The court reasoned:

> The differences in review procedure reflect justifiable distinctions regarding the treatment of each class.

[continuation of footnote 11]

detention of a person found not guilty by reason of insanity. The Court narrowly defined the issue before it. "The question presented is whether petitioner, who was committed to a mental hospital upon being acquitted of a criminal offense by reason of insanity, must be released because he has been hospitalized for a period longer than he might have served in prison had he been convicted." Id. at 356. The Court held that he did not have to be released. The Court also held that a finding of insanity at the criminal trial is sufficiently probative of mental illness and dangerousness to justify commitment and that the preponderance of the evidence standard comports with due process for commitment of insanity acquittees. In reaching its holding that the petitioner was not entitled to release, the Court stated that "[t]he committed acquittee is entitled to release when he has recovered his sanity or is no longer dangerous." Id. at 368. However, that statement reflects the Court's interpretation of the pertinent statutory law in the District of Columbia. Id. at 357 and n.3.

> . . . The state has a substantial interest in avoiding premature release of insanity acquittees, who have committed acts constituting felonies and have been declared dangerous to society. Because "the insanity acquittal supports an inference of continuing mental illness," Jones v. United States, [463 U.S. 354, 366 (1983)], the state's interest in protecting society and the acquittee himself justifies placing the burden on insanity acquittees to show that they no longer present a danger. See Powell v. Florida, 579 F.2d 324, 333 (5th Cir. 1978).

Hickey, 722 F.2d at 548. The court also rejected the insanity acquittees' due process challenge based on the United States Supreme Court's opinion in Jones:

> In Jones v. United States, the Court rejected a due process challenge to a District of Columbia statute that calls for automatic commitment of criminal defendants who successfully invoke the insanity defense. Jones however, precludes a due process challenge to the Washington commitment procedures. Jones does not directly address procedures for review and release of insanity acquittees. Nevertheless, the rationale of Jones compels us to reject this due process attack.

Id. (citations omitted). Similarly, the Fourth Circuit in Harris rejected an insanity acquittee's due process and equal protection claims:

> [W]e face the . . . question of whether a person may be incarcerated solely because he is dangerous. We hold that it is not a denial of due process for a person who has committed a criminal act to be incarcerated as long as he is considered dangerous. Nor do we think that this aspect of Virginia's scheme denies equal protection because a different standard (i.e., insane and dangerous) is used for persons other than insanity acquittees. Again, we think that the fact that an insanity acquittee has already been shown beyond a reasonable doubt to have committed at least one dangerous act justifies the distinction Virginia has drawn. See United States v. Ecker, 543 F.2d 178 (D.C. Cir. 1976), cert. denied, 429 U.S. 1063 . . . (1977) (upholding the use of a different standard for determining if insanity acquittees should remain committed than is used for other committed persons).

Harris, 681 F.2d at 228.

In Louisiana, a defendant found not guilty by reason of insanity in a non-capital felony case is committed to a mental institution only if the trial court determines that the defendant cannot be released without danger to others of to himself. La. Code Crim. P. art. 654. The medical staff of the mental institution shall review the defendant's record sixty days and one hundred twenty days after commitment and every one hundred eighty days thereafter to determine his present mental condition and whether he is presently capable of being discharged, conditionally or unconditionally, without being a danger to others or himself. La. R.S. 15:211. When the superintendent of the mental institution is of the opinion that a person committed pursuant to art. 654 can be released without danger to others or to himself, he shall recommend the discharge to a review panel. If the review panel recommends to the court that the person be discharged, the court shall conduct a contradictory hearing. La. Code Crim. P. art. 655(A). Additionally, a person committed pursuant to art. 654 may apply to the review panel for discharge six months after the commitment and every year thereafter. La. Code Crim. P. art. 655(B). At the hearing, the burden shall be upon the committed person to prove that he can be discharged without danger to others or himself.[12] After the hearing, the trial court may order him discharged, released on probation subject to specified conditions, or recommitted to the mental institution. La. Code Crim. P. art. 657.[13]

Civil commitment procedures are set forth in Title 28 of

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12 "[T]he placement of the burden of proof on the insanity acquittee at the release hearing does not violate either the equal protection clause or the due process clause." Benham v. Ledbetter, 785 F.2d 1480, 1491-92 (11th Cir. 1986).

13 The Official Revision Comment (b) to this article states that the Comments to Sec. 4.08 of the A.L.I. Model Penal Code, upon which this article is based, states:

[footnote 13 continued on next page]

the Louisiana Revised Statutes. Physicians may issue an emergency certificate for an involuntary fifteen-day commitment of a dangerous mentally ill person, La. R.S. 28:53, and any parish coroner or judge of a court of competent jurisdiction may order a person to be taken into protective custody for immediate examination if the person is mentally ill and in need of immediate treatment to protect the person or others from physical harm. La. R.S. 28:53.2. In addition, any person of legal age can initiate a judicial commitment proceeding. La. R.S. 28:54. After a hearing, a court may order a person judicially committed if it finds by clear and convincing evidence that he is dangerous to himself or others or is gravely disabled, as a result of mental illness. La. R.S. 28:55. Judicial commitments shall be reviewed by the court issuing the order sixty days and one hundred twenty days after commitment and every one hundred eighty days thereafter. At those intervals, the director of the treatment facility shall issue reports to the court setting forth the patient's response to treatment, his current condition, and the reasons why continued involuntary treatment is necessary to improve the patient's condition or to prevent it from deteriorating. La. R.S. 28:56(A). The court may at any time order a new hearing to determine whether the involuntary status should be continued. There must be at least

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[continuation of footnote 13]

> "It seems preferable to make dangerousness the criterion for continued custody, rather than to provide that the committed person may be discharged or released when restored to sanity as defined by the mental hygiene laws. Although his mental disease may have greatly improved, such a person may still be dangerous because of factors in his personality and background other than mental disease. Also, such a standard provides a possible means for the control of the occasional defendant who may be quite dangerous but who successfully feigned mental disease to gain an acquittal."

one review hearing annually, conducted according to the procedures and standards set forth in La. R.S. 28:54, 55 and 56. La. R.S. 28:56(B). The director of the treatment facility may at any time convert an involuntary commitment to a voluntary one should he deem that action medically appropriate. He shall inform the court of any action in that regard. The director may discharge any patient if in his opinion discharge is appropriate. La. R.S. 28:56(C). However, when a patient has shown dangerous tendencies, he shall only be discharged by the superintendent upon the written consent of the division of hospitals after an examination and after sufficient guarantee of proper supervision of the patient by a reputable person. La. R.S. 28:96(E), 28:96.1(E).

We find that the differences in Louisiana procedure reflect justifiable distinctions between persons civilly committed and persons found not guilty by reason of insanity. As the Ninth Circuit stated in Hickey:

> The class of insanity acquittees is composed of those committed by a different arm of the state for different reasons than civil committees. The different procedures are substantially related to the purposes of each statute and do not reflect discrimination against insanity acquittees. Our holding "accords with the widely and reasonably held view that insanity acquittees constitute a special class that should be treated differently from other candidates for commitment." Jones v. United States, [463 U.S. at 370].

Hickey, 722 F.2d at 547. Accordingly, the dangerousness test of La. Code Crim. P. arts. 654-657 satisfies equal protection.

To determine whether a procedure satisfies due process, we must balance three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481 (1972). The United States Supreme Court stated in Jones:

> It is clear that "commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." Addington v. Texas, 441 U.S. 418, 425 . . . (1979). Therefore, a State must have "a constitutionally adequate purpose for the confinement." O'Connor v. Donaldson, 422 U.S. 563, 574 . . . (1975).

Jones, 463 U.S. at 361. We find that the protection of society and defendant are constitutionally adequate purposes for continuing defendant's confinement. "There can be little doubt that in the exercise of its police power a State may confine individuals solely to protect society from the dangers of significant antisocial acts . . . ." O'Connor v. Donaldson, 422 U.S. 563, 582-83 (1975) (Burger, C.J., concurring). Hence, the dangerousness test of La. Code Crim. P. arts. 654-657 satisfies due process.

In sum, we find that the trial court did not abuse its discretion in finding that defendant did not prove that he could be released without danger to himself or others, and that the dangerousness test of La. Code Crim. P. arts. 654-657 is constitutional.

DECREE

For the reasons assigned, the judgment of the trial court is affirmed.

SUPREME COURT OF LOUISIANA

NO. 89-KK-1352

STATE OF LOUISIANA

versus

TERRY FOUCHA

On Writ of Certiorari to the
Court of Appeal, Fourth Circuit
Parish of Orleans

DENNIS, JUSTICE.

I respectfully dissent.

The question presented is whether a person, who was committed to a mental hospital upon being acquitted of a criminal offense by reason of insanity, must be released when he is no longer mentally ill, although he may still be a danger to himself or others.

Due Process

The United States Supreme Court answered this question on due process grounds in Jones v. United States, 463 U.S. 354, 370, 77 L.Ed.2d 694, 70, 103 S.Ct. 3043 (1983) when it said:

> We hold that when a criminal defendant establishes by a preponderance of the evidence that he is not guilty of a crime by reason of insanity, the Constitution permits the Government, on the basis of the insanity judgment, to confine him to a mental institution until such time as he has regained his sanity or is no longer a danger to himself or society.

It is true that the Supreme Court enunciated this holding in a case dealing with a different factual situation from that presented here. In Jones the issue was whether the petitioner, an insanity acquittee, had to be released because he had been hospitalized for a period longer than he might have served in prison had he been convicted. But I think it is self evident that the court intended its due process interpretation to be a neutral principle to be applied in all situations involving the confinement of insanity

acquittees. The high court held that the length of the sentence that an insanity acquittee might have received had he been convicted was irrelevant because the two essential requirements of his confinement were his insanity and his danger to himself or to society; when one of these ceases he must be released, regardless of whether that occurs before or after the lapse of a hypothetical sentence he might have served had he not been acquitted. Id. 463 U.S. 369.

Moreover, that Due Process will not permit a state to commit or continue to confine someone, civilly or criminally, without proof that he is both mentally ill and dangerous to himself or society was not only explicit in the court's holding and reasons but also implicit in its assumptions and analysis.

The petitioner in Jones, an insanity acquittee who had been hospitalized for longer than the one year he might have served for the petit larceny of which had been exonerated, based his argument on Addington v. Texas, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979), "in which the Court held that the Due Process clause requires the government in a civil-commitment proceeding to demonstrate by clear and convincing evidence that the individual is mentally ill and dangerous." Jones, 463 U.S. at 362. He contended that these due process standards were not met in his case because the judgment of not guilty by reason of insanity did not constitute a finding of present mental illness and dangerousness and because it was established only by a preponderance of the evidence. Id. Therefore, he asserted, because an insanity acquittee's confinement is not based on a finding that he is both dangerous and mentally ill, the only conceivable legitimate justification for the automatic commitment and confinement of an insanity acquittee is to ensure that he does not escape confinement entirely. Because Jones had been confined longer than the prison term he might have received, he argued, this purpose had been fulfilled and he should be released.

The Supreme Court accepted Jones' argument that Due Process requires the government, in order to commit an insanity acquittee, to

demonstrate that he is both mentally ill and dangerous, the same as it must in a civil-commitment proceeding. The Court rejected only his contentions that (1) a verdict of not guilty by reason of insanity lacks sufficient probativeness of both mental illness and dangerousness to justify commitment of the acquittee for the combined purpose of treatment and the protection of himself and society, id. 463 U.S. at 363-366; (2) an insanity acquittee's proof of his insanity in a criminal proceeding is based only on a preponderance of the evidence, as compared to the Addington v. Texas civil-commitment requirement of proof by clear and convincing evidence, id. 463 U.S. at 366-368; and (3) that he nonetheless was entitled to his release because he had been hospitalized for a period longer than he could have been incarcerated if convicted, id. 463 U.S. at 368-370.

Indeed, the Supreme Court in Jones made it clear that because "'commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection'" quoting Addington v. Texas, 441 U.S. 418, 425, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979), a state must have "'a constitutionally adequate purpose for the confinement.'" quoting O'Connor v. Donaldson, 422 U.S. 563, 574, 95 S.Ct. 2486, 45 L.Ed.2d 369 (1975). Jones v. United States, 463 U.S. at 361. The court indicated throughout its opinion as well as in its explicit holding, that dangerousness alone is not a constitutionally adequate purpose for confinement and that an effective procedure by which the committee may obtain his release upon showing that he is no longer mentally ill is essential to a constitutional civil or insanity acquittee commitment system. In determining whether an acquittee should be released, the court indicated, "the critical question [is] whether the acquittee has recovered" 463 U.S. at 366, and that it is important that there be "assurance that every acquittee has prompt opportunity to obtain release if he has recovered." Id. This is because "[t]he purpose of commitment following an insanity acquittal, like that of civil commitment, is to treat the individual's mental illness and protect him and society

from his potential dangerousness. The committed acquittee is entitled to release when he has recovered his sanity or is no longer dangerous." Id. 463 U.S. at 368. "His confinement rests on his continuing illness and dangerousness." Id. 463 U.S. at 369.

In the present case, the relator, Terry Foucha, was charged with aggravated burglary, La. R.S. 14:60, adjudged not guilty by reason of insanity and committed to a mental hospital on October 11, 1984. After he had been confined for several years, the superintendent of the hospital and a review panel on March 21, 1988 recommended that he be released on probation. La.C.Cr.P. art. 655. The district court, upon receipt of the recommendation, conducted a contradictory hearing to determine whether the committed person can be discharged, or can be released on probation, without danger to others or to himself. La.C.Cr.P. art. 657. After the hearing, the district court ordered the relator recommitted to the mental hospital. The court of appeal, with one judge dissenting, denied writs. ___ So.2d ___, 89-K-0708 (La.App. 4th Cir. 1989). We granted a writ to review the constitutional question presented. 548 So.2d 1215.

La.C.Cr.P. art. 657 provides that at the contradictory hearing to determine whether an insanity acquittee can be released on probation the burden is on the committed person to prove that he can be so released without danger to others or to himself. The relator failed to carry this burden because the only evidence regarding dangerousness was the testimony of a psychiatrist who said that he could not feel comfortable in certifying that relator would not be a danger to himself or others because relator had been involved in altercations with other patients at the hospital. On the other hand, relator, without a doubt, proved that he was not mentally ill. A psychiatrist appointed by the court to examine the relator testified that relator was in good shape mentally evidencing no signs of psychosis or neurosis; that upon commitment he probably had a drug induced psychosis, but that he had recovered from this temporary condition; and that he has a personality disorder, in that he has an

antisocial personality, but that this condition does not constitute a mental illness and is not subject to medical treatment. The parties stipulated that a second court appointed psychiatrist who examined relator would give essentially the same testimony. The three review panel members signed a report stating that relator's main diagnosis is "Antisocial Personality Disorder" and that he had not displayed any evidence of mental illness or disease since admission. They recommended that he be released on probation subject to specified conditions. Considering this evidence, the district court found that relator is a danger to others and ordered him recommitted.

Applying the Due Process principles announced by the United States Supreme Court in Jones v. United States, supra, to this case, I conclude that the relator, a committed insanity acquittee, has clearly demonstrated that he has recovered his sanity, is no longer suffering from a mental illness, and is therefore entitled to be released on probation. La.C.Cr.P. art. 657 is an incomplete statement of the applicable Due Process principles in that it fails to provide that an insanity acquittee is entitled to be released upon proof that he is either no longer mentally ill or is no longer dangerous to himself or others. Consequently, the district court and a majority of this court fell into error when they failed to apply the statute within the light or the context of the constitutional requirements. Accordingly, the ruling of the district court should be reversed and the case should be remanded to that court with instructions to release the relator on supervised probation subject to conditions to be specified by that court.

For well reasoned opinions in accord, see Hopkins v. Lynn, 888 F2d 35, 37 n.2 (5th Cir 1989)(Noting that the Circuit's previous expression that only presently mentally ill insanity acquittees may be confined is consistent with Jones v. United States, where the Supreme Court stated that an insanity acquittee's continued "confinement rests on his continuing illness and dangerousness." Supra, 463 U.S. at 369.); Francois v. Henderson, 850 F.2d 231, 236

(5th Cir. 1986)("[C]onfinement of insanity-acquittees solely on a finding of dangerousness...[makes] the mental institution the substitute for the prison in Louisiana [and] violates the Constitution."); Jackson v. Foti, 670 F.2d 516 (5th Cir. 1982). The authorities relied on by the majority for the opposite proposition are weak. Harris v. Ballone, 681 F.2d 225 (4th Cir. 1982) was decided prior to the Supreme Court's decision in Jones v. United States and is direct conflict with what the high court said in Jones. In Hickey v. Morris, 722 F.2d 543 (9th Cir. 1984) the court upheld a Washington statute placing the burden on insanity acquittees to show that they no longer present a danger, but the statute also provided that insanity acquittees cannot be confined longer than the maximum penal term for the crime charged, unlike the majority's holding in the present case which permits confinement of insanity acquittees on dangerousness alone indefinitely, perhaps for life, and clearly for periods far in excess of the time they would have served had they not been acquitted of the crimes with which they were charged.

Equal Protection

The protection of equal laws demands that a state afford insanity acquittees substantially the same protections that it gives persons committed under the ordinary civil commitment statute. Baxstrom v. Herold, 383 U.S. 107, 86 S.Ct. 760, 15 L.Ed.2d 620 (1966); Jackson v. Indiana, 406 U.S. 715, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972); Humphrey v. Cady, 405 U.S. 504, 92 S.Ct. 1048, 31 L.Ed.2d 394 (1972); Jackson v. Foti 670 F.2d 516 (5th Cir. 1982); Bolton v. Harris, 130 U.S.App.D.C. 1, 395 F.2d 642 (1968); Powell v. Florida 579 F.2d 324, 332 (5th Cir. 1978). Accordingly, if Louisiana's current insanity-acquittee provisions are interpreted and applied literally and mechanistically in disregard of constitutional principles, as the majority does herein, they clearly do not afford

insanity acquittees equal protection of the laws with respect to release from commitment. I agree with the analysis by the Court of Appeals in Francois v. Henderson, 850 F.2d 231, 236 (5th Cir. 1988) setting forth the reasons that the Louisiana statutes, if literally interpreted, do not give insanity acquittees protection substantially equal with that afforded to civil committees:

> As presently constituted, La. R.S. 28:59(A) provides: "Any person acquitted of a crime or misdemeanor by reason or insanity or mental defect may be committed to the proper institution in accordance with Code of Criminal Procedure Arts. 654 et seq." Those articles of the Code of Criminal Procedure provide for the commitment of an insanity acquittee following a hearing to determine the single issue of dangerousness. La. C.Cr.P. art. 654. Hearings on applications for release are likewise limited solely to the dangerousness issue. La. C.Cr.P. art. 655-657. There is no requirement that there be a finding of mental illness, either initially or upon application for release. The only relevant inquiry is the dangerousness element.
>
> This legislative change has provided for confinement of insanity-acquittees solely on a finding of dangerousness, and has made the mental institution the substitute for the prison in Louisiana. This violates the Constitution. Jackson v. Indiana, 406 U.S. at 724-25, 92 S.Ct. at 1851-52; Baxstrom v. Herold, 383 U.S. at 111-12, 86 S.Ct. at 762-63; Jackson v. Foti, 670 F.2d at 522 ("The propensity for danger is not enough."); Powell v. State of Florida, 579 F.2d 324, 332 (5th Cir. 1978).

Conclusion

Something is drastically wrong with a legal system that permits a person who is no longer mentally ill to be confined indefinitely, perhaps for life, in an institution for the criminally insane simply because he was acquitted of a crime (on the basis of insanity at the time of the offense), a crime for which, had he been convicted instead, he may have received a sentence of only a few months or years. In this respect the system is morally bankrupt and clearly

violates fundamental notions of due process and equal protection of law. The teachings of the Supreme Court and Fifth Circuit decisions make this manifestly evident. In my opinion the majority has defaulted in its duty to afford the relator these basic safeguards and has advanced no convincing reason for its failure to do so.

protection of society." S. Ct. at 3051 (emphasis added). The Court further stated that "The purpose of commitment following an insanity acquittal, like that of civil commitment, is to treat the individual's mental illness and protect him and society from his potential dangerousness. The committed acquittee is entitled to release when he has recovered his sanity or is no longer dangerous." Jones, S. Ct. at 3052 (emphasis added).

Assuring the safety of the insanity acquittee as well as the community is a legitimate state concern. The Louisiana statutes enacted to secure the safety of the insanity acquittee and society do not run afoul of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

CONCLUSION

Petitioner's request for a writ of certiorari to review the decision of the Louisiana Supreme Court should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have on this fourteenth day of December, 1990, caused a copy of the above and foregoing Brief in Opposition to be served by United States Mail, postage prepaid, upon the following:

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This 14th day of December, 1990.

New Orleans, Louisiana

PAMELA S. MORAN
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